

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KAREN ROLES**

Claimant

VS.

**THE BOEING COMPANY**

Respondent

AND

**INSURANCE COMPANY**

**STATE OF PENNSYLVANIA**

Insurance Carrier

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Docket No. 270,077

**ORDER**

Claimant appealed the July 16, 2003 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

**ISSUES**

This is a claim for a chemical exposure in the workplace. Although the Judge had previously ordered respondent and its insurance carrier to pay temporary total disability benefits, in the July 16, 2003 Order Judge Frobish determined claimant had reached maximum medical improvement and, consequently, granted respondent and its insurance carrier's request to terminate those benefits.

Claimant contends Judge Frobish erred. Claimant argues that respondent and its insurance carrier presented no new evidence regarding claimant's condition and, therefore, the Board's earlier orders finding this claim compensable are *res judicata*. Accordingly, claimant requests this Board to reverse the July 16, 2003 Order and to reinstate the temporary total disability benefits.

Conversely, respondent and its insurance carrier contend that the Board does not have jurisdiction to review the July 16, 2003 preliminary hearing Order as it does not pertain to any of the jurisdictional issues listed in K.S.A. 44-534a. In the alternative, respondent and its insurance carrier argue that the Board should affirm the July 16, 2003 Order as they have presented uncontradicted evidence that claimant's condition is permanent, not temporary, and that claimant has reached maximum medical improvement.

Therefore, respondent and its insurance carrier request the Board either to dismiss this appeal or to affirm the Judge's decision.

The only issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the July 16, 2003 preliminary hearing Order?
2. If so, is claimant temporarily and totally disabled from engaging in any substantial and gainful employment?
3. Does the doctrine of *res judicata* preclude the Judge from determining whether claimant is presently temporarily and totally disabled?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and after considering the parties' arguments, the Board concludes that it does not have jurisdiction to review the July 16, 2003 preliminary hearing Order.

Claimant's principal argument in this appeal is that she should continue to receive temporary total disability benefits as she continues to be temporarily and totally disabled as defined by the Workers Compensation Act. That issue, however, is not subject to review from a preliminary hearing order.

The Act limits the Board's jurisdiction to review preliminary hearing findings. Consequently, at this juncture not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.<sup>1</sup> Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

- (1) did the worker sustain an accidental injury,
- (2) did the injury arise out of and in the course of employment,
- (3) did the worker provide the employer with timely notice and with timely written claim, and
- (4) do certain other defenses apply.

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<sup>1</sup> K.S.A. 2002 Supp. 44-551(b)(2)(A).

And the term “certain defenses” refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.<sup>2</sup>

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue that is listed in K.S.A. 44-534a making it subject to review from a preliminary hearing order. Conversely, that issue involves questions of law and fact over which an administrative law judge has the authority and jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>3</sup>

Claimant's argument that the doctrine of *res judicata* applies and, therefore, the Judge erred by terminating the temporary total disability benefits without appropriate medical evidence is without merit. The doctrine of *res judicata* does not apply when the issue being litigated is not identical to the issue previously determined. The issue presented to Judge Frobish at the most recent preliminary hearing, which was held on July 15, 2003, was whether claimant was temporarily and totally disabled as of that date. The earlier preliminary hearings held in this claim addressed different periods of time. Accordingly, the factual issue before the Judge at the July 2003 hearing was not identical to those previously decided.

For the above reasons, claimant's appeal should be dismissed.

**WHEREFORE**, the Board dismisses claimant's appeal, leaving the July 16, 2003 Order in effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2003.

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BOARD MEMBER

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<sup>2</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>3</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

**KAREN ROLES**

**DOCKET NO. 270,077**

c: Michael L. Snider, Attorney for Claimant  
Kim R. Martens, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director